

EWING T. KERR
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
P. O. BOX 888
CHEYENNE WYOMING 82001

August 16, 1983

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SUPREME COURT, U.S.

Mr. Alexander Stevas, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

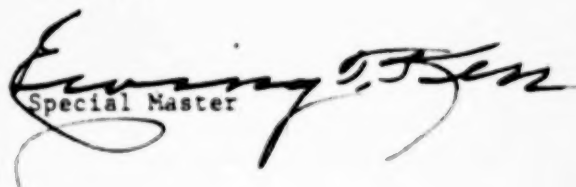
Re: State of Colorado v. State of New Mexico
and Paul G. Bardacke, Attorney General
of the State of New Mexico
No. 80, Original

Dear Mr. Stevas:

I am enclosing herewith Narrative Tender of
Evidence and Requested Findings Of Fact And Conclusions
Of Law, submitted by the State of New Mexico.

The Supreme Court in its decision left to the
discretion of the Special Master whether additional testimony
should be taken or make the additional findings based upon
the existing record. The Special Master elected not to take
additional evidence.

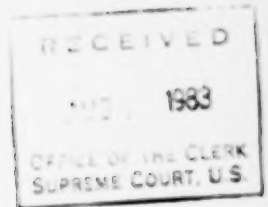
Sincerely,


Special Master

ETK/ks
Enclosure

cc: Mr. William A. Paddock
Mr. Robert F. Welborn
Mr. Peter T. White
Mr. Richard A. Simms

IN THE
SUPREME COURT OF THE UNITED STATES



THE STATE OF COLORADO,

Plaintiff,

vs.

No. 80, Original

THE STATE OF NEW MEXICO,
and PAUL BARDACKE, ATTORNEY
GENERAL OF THE STATE OF
NEW MEXICO,

Defendants.

NARRATIVE TENDER OF EVIDENCE
AND REQUESTED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Introduction

In our Motion to Receive Evidence of March 5, 1983, we requested that the Master fulfill his obligation to the Court by receiving additional evidence with respect to the stockponds in the Vermejo River drainage, the newly completed stock water delivery system, and measured flows in the main canal of the Vermejo Conservancy District. The evidence consists of relevant events which occurred after trial and new factual data which were published after trial by the U.S.G.S. It remains our belief that the evidence is essential to a complete, objective understanding of the evidence presented at trial and that the new factual data are essential to an accurate development of the facts in the specific areas in which the Court has requested findings of fact. Colorado v. New Mexico, 103 S.

Ct. 539 (1982).

On April 8, 1983, the Special Master denied the State of New Mexico the opportunity to present the evidence. As indicated in our letter of April 13, 1983, we are hereby submitting an offer of proof in order to preserve our right to show the Court that substantial rights of the State of New Mexico will have been affected by the Master's decision to exclude the evidence. In order to make the substance of the evidence known to the Master and to the Court, the nature and significance of the evidence is explained herein, the proposed testimony has been reduced to the attached affidavits and accompanying exhibits, and the post-trial U.S.G.S. publications and data compilations are enclosed herewith as additional exhibits.

Stockpond Evidence

Prior to trial the State of Colorado and the State of New Mexico agreed to the stipulated admission of numerous documents published by state and federal agencies. On the first day of trial, New Mexico explained that it had not agreed to the admission of certain of Colorado's proposed exhibits because their admission without testimony precluded cross-examination.

The exhibits that we singled out were Bureau of Reclamation letters and documents which repeat a reference to the opinion of a former Vermejo Conservancy District official that "the numerous water detention, stockwater, and fish pond structures which have been constructed during the last 20 years...[were] the primary causes of the [District's] water shortage." See, e.g.

Colo. Ex. No. 37, p. 1. At the time, we knew that the number of such structures in the Vermejo drainage was small and that the amount of Vermejo water they depleted was insignificant, but we had no factual data available to present to the Master.

In 1982, in cooperation with the U.S.G.S., the New Mexico State Engineer published Technical Report No. 44. The report includes water depletions by county from stockpond evaporation. See, N.M. Ex. No. P-53, Table 4. Based upon the data compiled in Technical Report 44, it was possible to estimate the depletion to the Vermejo River above the Vermejo Conservancy District's diversions due to stockponds. Using the data, we estimated an annual depletion of 170 acre-feet. See, Defendants' Brief on Remand, pp. 52-53 and Affidavit of Eluid L. Martinez, p. 2.

Following our initial estimation we undertook a hydrographic survey of all of the stockponds in the Vermejo River system in New Mexico above the Vermejo Conservancy District diversions. The survey was conducted by experienced surveyors under the direction of Eluid Martinez, a registered professional engineer and land surveyor and Chief of the Hydrographic Survey Section of the New Mexico State Engineer Office. See, Affidavit of Eluid L. Martinez, pp. 1-2. All of the ponds were identified and located in the survey. A representative sample of the stockponds (31%) was surveyed in the field by planetable mapping to delineate maximum water surface area and depth of the ponds. Volume was also determined.

The facts are as follows: 1) there is a total of 80 stockponds

in the entire Vermejo River drainage in New Mexico above the Vermejo Conservancy District's diversions; 2) there are no unadjudicated "fishponds" or unauthorized flood control structures in the Vermejo River drainage in New Mexico; 3) the aggregate capacity of all stockponds in service at maximum water surface level is calculated to be 212 acre feet; and 4) while the actual depletion is less, the maximum annual depletion from all of the stockponds ranges from 182 to 192 acre feet. See, generally, Affidavit of Eluid L. Martinez, pp. 2-4.

These facts contrast with Colorado's exploitation of a single statement, repeated in a number of Bureau of Reclamation letters, expressing the unfounded fear of a former official of the Vermejo Conservancy District. Colorado's evidence has no factual support in the record. The factual data we are offering establishes unquestionably that there is no proliferation of unregulated stockponds in the Vermejo system and that the depletion from the existing ponds is insignificant.

Stockwater System Evidence

When trial was completed, the status of the closed stockwater delivery system was still uncertain. The necessary funding had not been obtained, and the repayment burden on the member-users of the Maxwell Cooperative Water Users Association was not known. Notwithstanding that the record is incomplete in this regard, Colorado has divined the future with considerable license. For example, in its Reply Brief of the State of Colorado, Colorado

explained that "public money is available to finance the closed system for the delivery of stockwater." Id., at p. 52.

We are tendering evidence in this regard to complete the record with respect to an area in which there is considerable debate before the Master and the Court. Our objective was to enable the Court to render a decision based on the facts that actually transpired as opposed to groundless, argumentative conjecture.

As explained in Defendants' Brief on Remand, the farmers in the Vermejo Conservancy District, as well as the neighboring water users within the area embraced by the Maxwell Cooperative Water Users Association, initiated efforts to construct the enclosed system long before this suit was filed. Id., pp. 42-45. The purpose of the endeavor was to salvage water needed to relieve historic irrigation shortages. Tr. 1362.

The funding for the project was not obtained until May, 1982. The amount of funding was \$546,884.93, received from the New Mexico Environmental Improvement Division, the United States Agricultural Stabilization and Conservation Service, and the Farmers Home Administration. The New Mexico water users are obligated to repay \$220,000.00 of the total amount. See, Affidavit of Leonard S. Knox, Jr., p. 3.

Following funding, the necessary water right transfer applications were filed with the New Mexico State Engineer. Application Nos. CR-1333 and CR-1333-S were approved on July 21, 1982. Construction was begun on September 27, 1982 and is now

completed. Ninety-nine water meters have been installed to monitor both the livestock and domestic uses. See, Affidavit of Leonard S. Knox, Jr., pp. 3-4.

The completion of the system culminates over ten years of work by New Mexico water users to conserve their water supply. Use of the closed system will assist the Vermejo Conservancy District to more efficiently distribute water to its members, to achieve financial stability by producing crops on acreage left fallow as a result of historic shortages in water supply, and to repay its debt to the United States.

Evidence Derived from Measured
Flows in the Vermejo Canal of the
Vermejo Conservancy District

At trial there was conflicting evidence relating to the amount of water flowing past the Vermejo Conservancy District's headgate, i.e., the amount of water available to the downstream Canadian River users, who, without contradiction in the record, are 13% short of supply historically. Tr. 1368-78. There were also conflicting contentions as to the amount of water divertible by the Vermejo Conservancy District. Using New Mexico exhibits, Colorado asserted that "the District's diversion structure is capable of diverting the entire flow of the Vermejo River just below the Dawson gauge some 99.9% of the time...." Reply Brief of the State of Colorado, p. 65, citing N.M. Ex. Nos. F-18, D-1. New Mexico responded through the testimony of its experts. Mr. Mutz testified that the figure of 99.9% is only superficially impressive because the

flow duration exhibit from which it was taken was compiled on the basis of mean daily flows and not peak flows. Tr. 1131. Similarly, Mr. Ochs, the Bureau of Reclamation official responsible for the Vermejo Conservancy District, testified that at best 64% of the water at the District's diversion dam and headgate was divertible because the remaining quantity is in the peak flows. Tr. 1670-1677.¹

As trial was beginning, a gage was installed on the Vermejo Canal of the Vermejo Conservancy District, just above Stubblefield Reservoir. In February, 1982, published records became available for the water year 1981. With this post-trial U.S.G.S. publication, it was possible for the first time to compare the flows in the river with the actual, divertible flows.² See, Affidavit of Philip B. Mutz, p. 1; N.M. Ex. No. F-54. Also, in April of this year, the U.S.G.S. provided New Mexico with the provisional records for the water year 1982.³ N.M. Ex. No. F-55.

The facts now available show that in August and September of 1981 approximately 5500 acre-feet spilled past the Vermejo

- ¹ Notwithstanding the undisputed testimony in the record that the water that passes the Vermejo Conservancy District's headgate is captured and regulated in Conchas Reservoir for application to beneficial use in the Bureau's Tucumcari Project, the Master concluded that "there was no competent evidence of any dependency on Vermejo water by users downstream from the Vermejo Conservancy District." Report p. 4. Without contradiction, the record does not support this finding.
- ² As the Master is aware, Colorado equated all water "produced from the watershed" above the headgate as divertible and "available" to the Vermejo Conservancy District. Tr. 416; see, Defendants' Brief on Remand, Point II. Because Colorado's case depends on this equation, it is understandable that Colorado objects so vehemently to the admission of factual data that proves the contrary.
- ³ While these data are "provisional," they will be published this coming February likely without change. See, Letter from William Dein, Subdistrict Chief, U.S.G.S., N.M. Ex. No. F-54.

Conservancy District's headgate in the form of peak flood flows, i.e., the flows not embraced within Colorado's deceptive use of the flow duration time of 99.9%, and in August and September of 1982, approximately 4000 acre-feet spilled. A total of approximately 9500 acre-feet of Vermejo River water thus contributed to the supply of users on the Canadian River in these two years. See, Affidavit of Philip B. Mutz, pp. 2-3. While the amount of water in the Vermejo River at the Dawson gage from June through September, 1981 and from May through September, 1982 was 23,960 acre feet, the amount of water actually divertible to the Vermejo Conservancy District was 12,490 acre feet; 1970 acre feet of depletion occurred between the Dawson gage and the Vermejo Canal gage, and 9,500 acre feet spilled past the Vermejo Conservancy District's diversion dam and headgate in the form of short duration flood flows.

Based upon the actual recorded flow in the river and the actual recorded flow in the Vermejo Canal, Mr. Mutz prepared the two hydrographs attached to his affidavit. The hydrographs vividly show the difference between Colorado's "available" water supply and the actual, divertible supply. With equal vividness the hydrographs show the quantitative contribution from the Vermejo to the Canadian, albeit that these quantities passed the District's headgate during very brief periods of time. See, N.M. Ex. Nos. F-56 & F-57.

Conclusion

With due respect for the Master's decision to exclude this evidence, we have made this offer of proof because the present record is incomplete and factually inadequate. We hereby renew our request that the Master make available to the Court a full presentation of the relevant facts by permitting New Mexico to present evidence in these areas.

Proposed Findings of Fact

1. The total number of stockponds in the Vermejo River watershed in New Mexico above the Vermejo Conservancy District's diversion is 80.
2. There are no unadjudicated fishponds, or unauthorized flood control structures in the Vermejo River watershed in New Mexico.
3. The aggregate capacity of all of the stockponds in the Vermejo River drainage above the Vermejo Conservancy District's diversions in New Mexico is calculated to be 212 acre feet.
4. The maximum annual depletion of Vermejo River waters from all of the stockponds above the Vermejo Conservancy District's diversions in New Mexico ranges from 182-192 acre feet.
5. The stockponds that exist in the Vermejo River watershed in New Mexico are necessary to maintain the existing livestock industry in Colfax County.
6. Many years before this lawsuit was filed the New Mexico water

users in the Maxwell area and the Vermejo Conservancy District undertook to design, finance, and construct a closed stockwater delivery system to salvage water needed to relieve historic irrigation shortages to the Vermejo Conservancy District.

7. After formally associating for the purpose of negotiating for and obtaining funding for the project, in May, 1982 the Maxwell Cooperative Water Users Association received \$546,884.93 from the New Mexico Environmental Improvement Division, the United States Agricultural Stabilization and Conservation Service, and the Farmers Home Administration.
8. Of the capital cost of the closed stockwater delivery system of \$546,884.93, the New Mexico water users are obligated to repay \$220,000.00.
9. After the requisite water right applications were filed, processed, and approved by the New Mexico State Engineer, construction of the closed stockwater system was begun on September 27, 1982 and is now completed.
10. Because of historic water shortages, the farmers of the Vermejo Conservancy District have been forced to leave some of their land fallow and have been unable to make crops on planted lands.
11. The closed stockwater system was envisioned and ultimately constructed by the New Mexico water users in reliance upon anticipated water salvage.
12. Use of the water salvaged by the Vermejo Conservancy District farmers is necessary to achieve financial stability by

producing crops on acreage left fallow as a result of limited water supply and to repay its debt to the Bureau of Reclamation.

13. The effort undertaken by the New Mexico water users to conserve Vermejo River waters through the construction of a closed stockwater system was not initiated to make a gift of the water salvaged to a steel corporation in Colorado.
14. With the publication by the U.S.G.S. of measured flows in the Vermejo Canal of the Vermejo Conservancy District in February, 1982, it became possible to compare the gaged flows in the river at the Dawson gage and the flows capable of diversion by the Vermejo Conservancy District.
15. The difference between the recorded flows at the Dawson gage and the recorded flows in the Vermejo Canal approximates the amount of water spilled at the Vermejo Conservancy District's diversion dam and headgate.
16. As a result of typical, short duration, high intensity thunderstorms in August and September of 1981 and 1982, the two years for which the comparative data are available, approximately 9,500 acre feet of Vermejo River water spilled past the Vermejo Conservancy District and contributed to the water supply of the users on the Canadian River.
17. Because significant quantities of water rise in the Vermejo River during short duration, high intensity thunderstorms, much of the flow recorded by the Dawson gage is not divertible.
18. Flood flows of considerable magnitude occur frequently in the

summer months in the Vermejo River watershed.

19. Based upon annually recurring climatological conditions, the hydrographs comparing the gaged Vermejo River flows at Dawson with the gaged flows of the Vermejo Canal of the Vermejo Conservancy District are representative of the flood flows and spills at the District's diversions.

Proposed Conclusions of Law

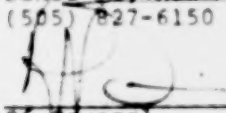
1. There is no proliferation of unregulated stockponds, fishponds, or other water detention structures in the Vermejo River watershed in New Mexico above the Vermejo Conservancy District's headgate.
2. All stockponds in New Mexico are subject to regulation by law.
3. The total depletion caused by all of the stockponds in the Vermejo River watershed in New Mexico above the Vermejo Conservancy District's diversions is insignificant in relation to the water supply and the shortages historically suffered by the Vermejo Conservancy District.
4. An equitable apportionment does not contemplate an award of all water conserved in one state to another state.
5. Equity requires that water conserved in reliance on anticipated water salvage needed to help offset historic water shortages be awarded to the water users who effected the conservation.
6. The use of the water salvaged by the stockwater delivery

system is within the water right entitlement of the Vermejo Conservancy District.

7. If the Vermejo Conservancy District is not able to use the water salvaged by the closed stockwater delivery system, its ability to repay its contractual obligation to the United States will be impaired.
8. Equity does not contemplate a vicarious award to Colorado Fuel & Iron Steel Corporation of the waters conserved by New Mexico water users to help relieve historic shortages in supply.
9. Recorded annual flows in the Vermejo River cannot be used to determine the amount of water available or divertible by the water users.

Respectfully submitted,
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Jay F. Stein
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CERTIFICATE OF SERVICE

I, Richard A. Simms, of counsel hereby certify that I am a member of the bar of this Court and that on May 13, 1983, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Narrative Tender of Evidence and Requested Findings of Fact and Conclusions of Law prepaid, to the following officials of the State of Colorado:

The Honorable Richard D. Lamm
Governor of the State of Colorado
136 State Capitol
Denver, Colorado 80203

The Honorable J. D. MacFarlane
Attorney General of the State
of Colorado
1525 Sherman, 3rd Floor
Denver, Colorado 80203

I certify that on May 13, 1983, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by first class mail, postage prepaid, the requisite number of copies of the foregoing Narrative Tender of Evidence and Requested Findings of Fact and Conclusions of Law, on the following counsel of record:

Mr. William A. Paddock
Assistant Attorney General
Attorney General's Office
Natural Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Mr. Robert F. Welborn
Assistant Attorney General
Welborn, Dufford & Brown
1700 Broadway
Denver, Colorado 80290

I certify that all parties required to be served have been served.


Richard A. Simms